88-295

No. _____

IN THE

Supreme Court of the United States

October Term, 1988

LOCAL UNION 598, PLUMBERS & PIPEFITTERS INDUSTRY JOURNEYMEN & APPRENTICES TRAINING FUND,

Plaintiff-Appellant,

v.

J.A. JONES CONSTRUCTION COMPANY; BECHTEL POWER CORPORATION; AND JOHNSON CONTROLS, INC.,

Defendants-Appellees.

JURISDICTIONAL STATEMENT ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Question Presented

Did Congress intend ERISA[1] to preempt long-standing state prevailing wage laws which include in their minimum wage calculation a specified portion payable to an apprenticeship fund?

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[1] "ERISA" refers to the Employee Retirement Income Security Act of 1974, Public L. No. at 93-406, 66 STAT. 829 (1974) as amended (codified in scattered sections of 5, 18, 26, 29 and 31 U.S.C.)

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OPINIONS

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 846 F.2d 1213. It is reprinted in Appendix A.

The order and judgment of the United States District Court for the Western District of Washington have not been reported. They are reprinted in Appendix B.

JURISDICTION

This action was filed in state court alleging a violation of Washington's Prevailing Wage On Public Works Statute, RCW 39.12. The case was removed to the federal District Court for the Western District of Washington on diversity of citizenship grounds. 28 U.S.C. § 1441(b) (App. A-5-7). The District Court dismissed the claim as pre-empted by ERISA. (App. B-6)

On May 18, 1988 the Ninth Circuit affirmed, holding that "to the extent the Washington prevailing wage statute requires employers to maintain a certain level of contributions to employee benefit plans, it is preempted by § 514(a)" of ERISA. (App. A-18) A Notice of Appeal was filed in the Ninth Circuit Court of Appeals on August 2, 1988. (Appendix C) This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1254(2).

STATUTORY PROVISIONS INVOLVED

Employee Retirement Income Security Act of 1974, § 514, 29 U.S.C. § 1144

Washington's Prevailing Wage on Public Works Statute, Revised Code of Washington (RCW) 39.12.

Pertinent Portions Reproduced In Appendix D.

STATEMENT OF THE CASE

Plaintiff-Appellant Local Union 598, Plumbers and Pipefitters Industry Journeymen and Apprentices Training Fund ("Fund") is a labor-management apprenticeship training trust located in Washington State. Defendants-Appellees J.A. Jones Construction Company, Bechtel Power Corporation and Johnson Controls, Inc. ("Contractors") are contractors which performed plumbing and pipefitting work on a Washington Public Power Supply System project near Richland, Washington.

Appellant Fund filed this case on July 18, 1984, in state court, alleging a violation of Washington's Prevailing Wages On Public Works Statute, RCW 39.12. This forty year old statute requires contractors working on state public works projects to pay specified minimum wages to their employees. (App. D-6, RCW § 39.12.020) Wage rates are determined by the State's Industrial Statistician pursuant to area surveys. (App. D-6, RCW § 39.12.015). The minimum wage calculation includes both direct wages, overtime, and "usual benefits". (App. D-5-6, RCW § 39.12.010) "Usual benefits" include, in part, "[t]he rate of costs to the contractor... which may be reasonably anticipated in providing benefits to workmen, laborers, and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program... for defraying costs of apprenticeship or other similar programs". (App. D-5-6, RCW § 39.12.010(3)(b))

The Fund alleges the Contractors failed to make apprenticeship contributions for labor performed by union craftsmen on the Richland project at the minimum levels mandated by RCW 39.12. Instead, pursuant to a collective bargaining agreement with a national union, the Contractors made contributions at levels below those required by the state minimum wage law. (App. A-5) In this action, Appellant Fund seeks the difference between contributions paid and contributions due under the state law.

The Contractors removed the case to the Federal District Court, and moved to dismiss, in part, alleging ERISA preemption. (App. A-5-7)[2] The District Court granted the motion to dismiss, holding that Section 514(a) of ERISA preempts the Washington statute insofar as it requires employer contributions to the apprenticeship plan. (App. B).

The Union appealed to the Court of Appeals for the Ninth Circuit. In a decision issued May 18, 1988, the Court affirmed the District Court's finding of ERISA preemption. (App. A-18). The Court held that (App. A-18):

> In conclusion, the clear and express purpose of Washington Revised Code § 39.12.010(3) is to govern employer contributions to employee benefit plans, including apprenticeship training plans. The statute on its face "purports to regulate" employee benefit plans. Accordingly, we hold that, to the extent the Washington prevailing wage statute requires employers to maintain a certain level of contributions to employee benefit plans, it is preempted by section 514(a).

---

[2] The contractors also sought dismissal based on alternative defenses that (1) the Fund lacks standing, and (2) the lack of an "enforceable commitment" allegedly required under state law. In light of its finding of preemption, the District Court's decision reached neither defense. (App. B-6). The Ninth Circuit rejected the contractor's standing defense, and apparently in reliance upon the well pleaded complaint rule, did not reach the contractor's second defense. (App. A-7-8, 10).

STATEMENT OF REASONS FOR PLENARY CONSIDERATION

PLENARY CONSIDERATION IS WARRANTED ON WHETHER CONGRESS INTENDED ERISA TO PREEMPT LONG-STANDING STATE MINIMUM WAGE LAWS WHICH INCLUDE EMPLOYEE BENEFIT CONTRIBUBTIONS AS A COMPONENT OF MINIMUM WAGES.

Section 514(a) of ERISA supersedes "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan..." covered by the statute. 29 U.S.C. §1144(a). This Court has not yet had occasion to consider whether in passing this provision, Congress intended to preempt state minimum wage laws, which include, in the minimum wage calculation, a portion payable to an employee benefit plan. Nor has this Court considered the issue of whether a state law which affects *only funding of welfare benefit plans* (as opposed to administration, benefits, reporting, disclosure or fiduciary responsibilities) falls within ERISA's preemptive reach.[3]

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[3] *See eg: Allessi v. Raybestos Inc.*, 451 U.S. 504, 526 (1981) (state law barring method of computing pension benefit permitted by ERISA preempted); *Stone & Webster v. Ilsley*, 690 F.2d 323, 329 (2nd Cir. 1982), *aff'd* mem. sub nom., *Arcudi v. Stone & Webster Eng'g Corp.*, 463 U.S. 1220 (1983) (state statute requiring both contribution by employer and payment of specific benefit to beneficiary preempted); *Standard Oil Co. of California v. Agsalud*, 633 F.2d 760 (9th Cir. 1980) *aff'd* mem. sub nom 454 U.S. 801 (1981) (state law requiring employer establishment of specific benefit plan and contributions preempted; *Shaw v. Delta Airlines*, 463 U.S. 85, 91, 96 (1983) (state laws preempted to degree they required payment of specific benefits, not mandated by federal law, through ERISA covered plans); *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 739 (1985) (finding state statute requiring specific mental health care benefit "relates to" plan within meaning of ERISA); *Pilot Life Insurance Company v. Dedeaux*, 481 U.S. ____, 95 L.Ed.2d 39, 47-48 (1987) (holding state common law claims for improper processing of claim for benefits preempted); *Metropolitan Life Insurance Company v. Taylor*, 481 U.S. ____, 95 L.Ed.2d 55, 62 (1987) (same); *Mackey v. Lanier Collection Agency*, ____ U.S. ____, 56 U.S.L.W. 4631, 4635 (1988) (general state garnishment law held not preempted).

Although the scope of ERISA preemption is broad, not all state laws which impact ERISA covered plans are preempted. As stated by this Court in *Shaw v. Delta Airlines*, 463 U.S. 85, 101, n. 2 (1983), "[s]ome state actions may affect employee benefit plans in too tenuous, remote or peripheral a manner to warrant a finding that the law 'relates to' the plan." *See e.g.: MacKey v. Lanier Collection Agency*, 57 U.S.L.W. at 4635 (state general garnishment procedures not preempted as to welfare benefit plans).

As in any preemption analysis, "the purpose of Congress is the ultimate touchstone" in analyzing ERISA preemption. *Metropolitan Life*, 471 U.S. at 747 [quoting *Malone v. White Motor Co.*, 435 U.S. 497, 504 (1978)]. At the outset, the Court should "presume that Congress did not intend to preempt areas of traditional state regulation." *Metropolitan Life*, 471 U.S. at 740.

In some cases, the substantive scope of ERISA itself reflects a Congressional decision to leave areas open to state regulation. In *MacKey v. Lanier Collection Agency*, 56 U.S.L.W. at 4633-4636, this Court faces the issue of whether ERISA preempts application of Georgia's general garnishment procedures to welfare plan benefits. The Trust argued that garnishment necessarily "related to" the plan, because it requires trustees to participate in litigation, divert benefits to creditors, and suffer substantial administrative burdens and costs. In analyzing this issue, this Court relied on the fact that "[w]here Congress intended in ERISA to preclude a particular method of state-law enforcement of judgments, or extend anti-alienation protection to a particular type of ERISA plan, it did so expressly in the statute." 56 U.S.L.W. at 4634. Specifically, Congress chose to enact anti-alienation provisions for pension plan benefits, but not for welfare plan benefits. 56 U.S.L.W. at 4634. Congress's decision to remain silent regarding attachment of welfare plan benefits led this Court to conclude that Congress "acknowledged and

accepted" the existing state garnishment law. 56 U.S.L.W. at 4634.

The Washington statute at issue here was modeled from the federal Davis-Bacon Act, 40 U.S.C. §276 and long predates ERISA. Its purpose, like the purpose of its federal counterpart, is to "provide protection to local craftsmen who lose work because contractors engage in the practice of recruiting labor from distant cheap labor sources." *Southeastern Washington Building Trades Council v. Department of Labor & Industries*, 91 Wn.2d 41, 45 (1978). *See also: United States v. Binghamton Construction*, 347 U.S. 171, 176-78 (1954) (identifying same purpose for federal Davis-Bacon Act).

Not surprisingly, Washington's statute includes fringe benefits in its calculation of minimum wages. (App. D-5-6, RCW 39.12.010). As stated in *California Hospital Assoc. v. Hennings*, 770 F.2d 856, 860, (9th Cir. 1985) *cert. den.* 106 S.Ct. 3273 (1986) after World War II "such benefits became a means of compensating workers in lieu of increased wages." To exclude benefits from the minimum wage calculation would effectively require that minimum wages be set at substandard levels, thereby directly defeating the legislature's goal.

The Ninth Circuit's decision to hold Washington's minimum wage statute preempted has far-reaching implications. The Court's rationale broadly prohibits states from formulating minimum wages in a fashion requiring employers to bear the costs of any fringe benefit programs. (App. A-12-14). The same reasoning has now been extended to bar states from requiring non-union contractors working for a state to bear the cost of a state-sanctioned apprenticeship program. *See: Hydrostorage Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee*, 685 F.Supp. 718, 726 (N.D. Cal. 1988) *appeal pending* (holding California's Labor Code Section 1777.5 preempted by ERISA insofar as it requires non-union contractor to pay costs of apprenticeship program).

Twenty-two states have public works-prevailing wage statutes similar or identical to Washington's.[4] These statutes cover state sponsored public works projects throughout the nation. The broad implications of the Ninth Circuit's decision, standing alone, warrant plenary consideration.

Moreover, there is, at a minimum, a serious question as to whether Congress intended to preempt state minimum wage laws. That the states have a fundamental interest in assuring that minimum wages and adequate apprenticeship programs be maintained on projects they fund can hardly be doubted. This Court has emphasized that "pre-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the state." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. ____, 96 L.E.2d 1, 17 (1987). It would be odd indeed if Congress in enacting ERISA, a statute designed to protect workers, intended to invalidate long-standing minimum wage laws which had heretofor served as one of the state's principal weapons in protecting workers.

Moreover, here, as in *MacKey*, the structure of the statute itself suggests that Congress chose not to bar state regulation of funding of welfare benefit plans. As stated in *Metropolitan Life*, 471 U.S. at 732:

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[4] Alaska Stat. §36.05.010; Arkansas Stat. Ann. §22-9-308; Cal. Labor Code, §§1771, 1773; Del. Code Ann. Tit. 29, §6912; Fl. Stat. Ann. §235.32; Haw. Rev. Stat. §104; Ill. Ann. Stat. Ch. 48, §§3952-3953; Me. Rev. Stat. Ann. Titl 26, §§1303, 1304(9); Md. State Finance & Procurement Code Ann. §§12-301, 304; Mich. Stat. Ann. §17.256(2); Minn. Stat. Ann. §§177.41, 177.42(6); Mo. Ann. Stat. §290.230; Neb. Rev. Stat. §73-102; N.J. Stat. Ann. §34:11-56; N.Y. Labor Laws §220; Ohio Stat. §4115.05; Ok. Stat. §196.3; Penn. Stat. Tit. 43, §§165(4)-(7); Tenn. Stat. §439; Vir. Stat. Art. XIV, §64; Wisconsin Stat. §103.49; Wyoming Stat. §§27-4-403, 27-4-405.

> ERISA imposes upon *pension plans* a variety of substantive requirements relating to participation, *funding* and vesting. §§ 201-306, 29 U.S.C. §§ 1051-1086. It also establishes various uniform procedural standards concerning reporting, disclosure, and fiduciary responsibility for *both pension and welfare plans*. §§ 101-111, §§ 401-414, 29 U.S.C. §§ 1021-1031, 1101-1114. It does not regulate the substantive content of welfare benefit plans. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). (emphasis added)

Here, as in *MacKey*, Congress's decision to regulate in the field pension plan funding, but not welfare plan funding, suggests Congress chose to leave welfare plan funding open to traditional state regulation. This statutory scheme comports with reality. Trustees for health, welfare and apprenticeship trusts ordinarily have no control over funding. Although they are responsible for establishing and administering the benefit plan through which trust assets are distributed, funding is controlled by employer-union negotiations. Hence trust agreements for such plans, unlike those for pension plans, ordinarily do *not* relate in any way to employer contributions.[5]

---

[5] For these reasons, cases holding that ERISA preempts state laws dictating payment of specific benefits are inapposite. The Ninth Circuit's reliance on *Stone and Webster Engineering Corp. v. Ilsley*, 690 F.2d 323, 329 (2nd Cir. 1982), *aff'd* memo. sub nom. *Arcudi v. Stone and Webster Engineering Corporation*, 463 U.S. 1220 (1983), does not dictate a contrary result. (App. A-14-15). *Webster* did not involve a minimum wage statute. Moreover, it dictated payment of both contributions and benefits. Hence, it is distinguishable. In any event, this Court's summary affirmance of the lower court's decision does not reflect adoption of the court's reasoning. *See: Sporhase v. Nebraska Ex Rel Douglas*, 458 U.S. 941, 949 (1982) (by summarily affirming lower court, Supreme Court "did not necessarily adopt the court's reasoning").

Here, an apprenticeship trust is at issue. The statute does not require any employer to establish an apprenticeship plan. It does not dictate how trustees expend funds collected. It does not restrict the trustees' decisions regarding the nature of benefits included in the plan. It does not dictate that claims be processed in any particular fashion. Its only effect is to require employers who choose to work on state-funded projects to pay the cost of funding an apprenticeship plan.

To hold that states may no longer require contractors who choose to work on state sponsored public works projects to pay apprenticeship fund costs is equivalent to holding that ERISA leaves nothing to the states. Plenary consideration is warranted before this Court concludes that Congress intended to deprive states of their traditional power to establish minimum wages.

DATED this ____ day of _____, 1988.

Respectfully Submitted,
Hugh Hafer
David Campbell

Counsel for Appellants

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LOCAL UNION 598, PLUMBERS & PIPEFITTERS INDUSTRY JOURNEYMEN & APPRENTICES TRAINING FUND,
Plaintiff-Appellant,

v.

J.A. JONES CONSTRUCTION COMPANY; BECHTEL POWER CORPORATION; and JOHNSON CONTROLS, INC.,
Defendants-Appellees.

No. 85-3894

D.C. No. C84-1120 C

OPINION

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued and Submitted
August 4, 1986—Seattle, Washington

Filed May 18, 1988

Before: Cecil F. Poole, William A. Norris and Robert R. Beezer, Circuit Judges.

Opinion by Judge Beezer

SUMMARY

Pensions/Labor

Appeal from judgment. The court affirmed holding that, to the extent the Washington prevailing wage statute requires

employers to maintain a certain level of contributions to employee benefit plans, it is preempted by ERISA section 514(a).

Appellee construction companies performed work on a state project. Appellant Local Union 598 (Local Fund) is a labor-management apprenticeship and training trust fund. It sued in state court contending that the contractors failed to make apprenticeship training contributions for labor performed by workers of the local union at the minimum level mandated by state law. Instead, the contractors made contributions to a national apprenticeship training fund at the lesser level established by a collective bargaining agreement with the national union. The Local Fund seeks the difference between the two. The contractors removed and were subsequently granted a motion to dismiss. The district ruled that the state statute, to the extent it mandates employer contributions at a particular level to employee welfare benefit plans, is preempted by section 514(a) of ERISA because the state law "relates to" and "purports to regulate" an employee benefit plan.

[1] The Local Fund at no time raised any objection to federal jurisdiction. Hence, although removal was initially improper, the jurisdictional defect was cured before judgment on the merits when the Local Fund voluntarily dropped the party whose presence prevented proper diversity jurisdiction. [2] The Washington statute requires employers on public works projects to make contributions to employee benefit plans at or above the mandated "prevailing wage" level, regardless of the level of contributions established by employment contract or collective bargaining agreement. [3] Local Fund alleges that the contractors are in violation of the statute by failing to pay the full prevailing rate of costs for apprenticeship training as required. [4] The Washington prevailing wage statute is preempted by section 514(a) because it "relates to" ERISA plans. Statutes regulating contributions to ERISA plans have consistently been held preempted. [5] The

Local Fund's argument against preemption, hinging on a "contribution/benefit" dichotomy, is unsupported by the law. [6] They further argue that state statutes regulating contributions by employers to "employee welfare benefit plans" are not preempted by ERISA because Congress did not purport to regulate the obligation to make contributions to welfare plans. ERISA's minimum standards are inapplicable to welfare plans, including apprenticeship trusts. [7] However, it is not necessary to identify a specific ERISA provision that conflicts with a challenged state law. [8] Furthermore, preemption of state laws regulating employer contributions to employee welfare plans serves the congressional purpose of "eliminating the threat of conflicting or inconsistent state and local regulation of employee benefit plans." [9] The Local Fund's last argument against preemption invokes the exercise of a traditional state power. [10] However, the strength of the state interest is of no consequence where the state law clearly "purports to regulate" an employee benefit plan.

COUNSEL

Hugh Hafer and David Campbell, Hafer, Price, Rinehart & Schwerin, Seattle, Washington, for the plaintiff-appellant.

Ronald F. Garrity, Thelen, Marrin, Johnson & Bridges, San Francisco, California; Frederick T. Rasmussen and Paul R. Haerle, Riddell, Williams, Bullitt & Walkinshaw, Seattle, Washington; Patricia C. Williams and John C. Black, Winston & Cashatt, Spokane, Washington, for the defendants-appellees.

OPINION

BEEZER, Circuit Judge:

Plaintiff, an employee welfare benefit plan, brought this action against the defendant employers alleging a violation of

Washington state's "prevailing wage" on public works statute. The Washington statute, Wash. Rev. Code ch. 39.12, requires employers on public works projects to make contributions to employee benefit plans at or above the mandated "prevailing wage" level, regardless of the level of contributions established by employment contract or collective bargaining agreement. The district court held that section 514(a) of the federal Employee Retirement Income Security Act ("ERISA") preempted the Washington statute insofar as it "relates to" an employee benefit plan. We affirm.

I

Defendants, J.A. Jones Construction Company, Bechtel Power Corporation, and Johnson Controls, Inc.,[1] are contracting companies which performed plumbing and pipefitting work on a Washington Public Power Supply System project near Richland, Washington. Plaintiff, Local Union 598, Plumbers & Pipefitters Industry Journeymen & Apprenticeship Training Fund ("Local Apprenticeship Fund"), is a labor-management apprenticeship and training trust fund.

On July 18, 1984, the Local Apprenticeship Fund brought an action in Washington state court alleging a violation of Washington's public works "prevailing wage" statute, Wash.

[1]The present status of Johnson Controls, Inc. in this litigation is somewhat unclear. The district court's order of dismissal in favor of the defendants names only Bechtel Power Corporation and J.A. Jones Construction Company. The district court's order mistakenly states that all other defendants had been dismissed with prejudice by stipulation. In fact, a third defendant, Johnson Controls, Inc., had not been so dismissed.

However, the district court's order dismissed the entire action with prejudice. The plaintiff has not contended that Johnson Controls, Inc. was not included in that dismissal. No separate issues of law or fact have been raised that pertain only to Johnson Controls, Inc. Johnson Controls, Inc. has joined with the other two defendants in appellees' briefs before this court. We assume therefore that the dismissal by the district court applies with full force against all three remaining defendants.

Rev. Code ch. 39.12. The Local Apprenticeship Fund contends that the defendant contractors failed to make apprenticeship training contributions for labor performed by workers of the local union at the minimum level mandated by the state law. Instead, the defendants made contributions to a national apprenticeship training fund at the lesser level established by a collective bargaining agreement with the national union. The Local Apprenticeship Fund seeks the difference between the contributions paid and contributions allegedly due under the state prevailing wage statute.

The defendant contractors removed the action to federal district court. After the Local Apprenticeship Fund filed an amended complaint in the district court worded identically to the state court complaint, the defendants moved to dismiss, contending that the state prevailing wage law as it applies to employee benefit plans is preempted by ERISA. The district court granted the motion to dismiss, ruling that the state statute, to the extent it mandates employer contributions at a particular level to employee welfare benefit plans, is preempted by section 514(a) of ERISA, 29 U.S.C. § 1144(a), because the state law "relates to" and "purports to regulate" an employee benefit plan. The Local Apprenticeship Fund appeals.

II

Removal is a question of federal subject matter jurisdiction reviewable de novo. *Gould v. Mutual Life Ins. Co.*, 790 F.2d 769, 771 (9th Cir.), *cert. denied*, 107 S. Ct. 580 (1986). The defendant contractors properly removed this action to federal district court on diversity of citizenship grounds.[2]

[2]After the defendant contractors had removed this action, the plaintiff Local Apprenticeship Fund filed an amended complaint in district court. Because this complaint was worded identically to the state court complaint which had been removed, the amendment has no effect upon our jurisdictional inquiry.

To be removable on diversity grounds, a case must exhibit complete diversity of citizenship between the plaintiffs and the defendants. *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch.) 267 (1806). Furthermore, for diversity removal to be proper, none of the defendants may be a citizen of the state in which the action is brought. 28 U.S.C. § 1441(b).

Considering the posture of this case at the time of removal, neither of these two requisites for diversity removal was met. The complaint named one defendant, Wright-Schuchart, Inc., a Washington state corporation, which was not diverse as to the Washington state plaintiff. If a state action includes non-diverse parties, it may not be removed until those parties have been dismissed. *American Car & Foundry Co. v. Kettelhake*, 236 U.S. 311 (1915); *Othman v. Globe Indem. Co.*, 759 F.2d 1458, 1463 (9th Cir. 1985), *overruled on other grounds, Bryant v. Ford Motor Co.*, 832 F.2d 1080, 1082 (9th Cir. 1987) (en banc). Moreover, this non-diverse defendant was also a citizen of the state in which the action was brought, thereby precluding removal jurisdiction by virtue of 28 U.S.C. § 1441(b). Because removability is generally determined as of the time of the petition for removal, federal jurisdiction would ordinarily be defeated in this case.

However, in *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699 (1972), the Supreme Court held that a judgment of a district court may be upheld even if there was no right to removal, if the case has been tried on the merits and the federal court would have had original jurisdiction had the case been filed in federal court in the posture it had at the time of the entry of final judgment. *See also American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 16-17 (1951).

In this circuit, *Grubbs* has been made applicable not only to judgments after trials on the merits but also determinations of summary judgment motions which dispose of the merits. *See, e.g., Gould*, 790 F.2d at 773; *Beers v. Southern Pac. Transp. Co.*, 703 F.2d 425, 427 (9th Cir. 1983). Where the

plaintiff has made no objection to jurisdiction before judgment and the jurisdictional defect has been cured before the district court by the plaintiff's voluntary action, we see no reason not to apply *Grubbs* to judgments of dismissal on the merits.

[1] In this case, subsequent to removal, but before the judgment of dismissal, the plaintiff Local Apprenticeship Fund stipulated to the dismissal of the non-diverse defendant Wright-Schuchart, Inc. The plaintiff at no time has raised any objection to federal jurisdiction. Hence, although removal was initially improper, the jurisdictional defect was cured before judgment on the merits when the plaintiff voluntarily dropped the party whose presence prevented proper diversity jurisdiction. *See* 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3723, at 319 (2d ed. 1985).

Accordingly, the district court had jurisdiction to enter judgment.

III

The plaintiff pleads sufficient facts to support its standing to claim damages under the Washington prevailing wage statute. The plaintiff's amended complaint concisely states:

> 1. Plaintiff is a labor-management apprenticeship and training trust.
>
> 2. Defendants are contractors or subcontractors who performed plumbing or pipefitting work in the Richland, Washington area for the Washington Public Power Supply System.
>
> 3. Defendants failed to pay costs of apprenticeship as required by RCW 39.12.010(3)(b) and RCW 39.12.020. Plaintiff is entitled to recover from

> Defendants the costs of apprenticeship, less any sums paid the UA-NCA Training Trust Fund. The exact amount due is not known, but will be proved at time of trial.
>
> WHEREFORE, Plaintiff prays for judgment in the amount proved to be due for costs of apprenticeship and for other relief as may be appropriate.

Under Federal Rule of Civil Procedure 8(a)(2), a plaintiff need only make "a short and plain statement of the claim showing that the pleader is entitled to relief." The complaint before us in essence makes two allegations: first, Washington requires contractors to pay apprenticeship costs; second, plaintiff is entitled to recover such costs from the defendant contractors. There is no material difference between these allegations and those in a complaint stating that plaintiff delivered services to defendant and defendant failed to pay for the services rendered. The plaintiff has standing because it seeks relief for an actual injury which is fairly traceable to the defendants' allegedly unlawful conduct and is likely to be redressed by the requested relief. *See Allen v. Wright*, 468 U.S. 737, 751 (1984).

IV

Washington Revised Code chapter 39.12 is a "prevailing wage" statute applicable to all public works projects by the state, or any county, municipality, or political subdivision. Wash. Rev. Code § 39.12.020. Persons contracting for the construction of any public work must agree to pay the prevailing wage in that locality to their employees. *Id.* § 39.12.030 - .040.

The Washington statute is patterned after the federal Davis-Bacon Act, 40 U.S.C. § 276a et seq., which applies to federal public works projects. *Southeastern Washington Bldg. & Constr. Trades Council v. Department of Labor & Indus.*, 91

Wash. 2d 41, 44, 586 P.2d 486, 488 (1978). Like the Davis-Bacon Act, the Washington prevailing wage statute is intended to "provide protection to local craftsmen who were losing work because contractors engaged in the practice of recruiting labor from distant cheap labor areas." 91 Wash. 2d at 45, 586 P.2d at 488.

[2] Under the Washington statute, wages paid to laborers, workmen, or mechanics by public works contractors "shall be not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality within the state where such labor is performed." Wash. Rev. Code § 39.12.020. This "prevailing rate of wage" is defined as "the rate of hourly wage, usual benefits, and overtime paid in the locality" to a "majority" of those in the same occupation or trade. *Id.* § 39.12.010(1).[3]

"Usual benefits" consist of (1) "[t]he rate of contribution irrevocably made by a contractor . . . to a trustee or to a third person pursuant to a fund, plan, or program," *id.* § 39.12.010(3)(a), and (2) "[t]he rate of costs to the contractor . . . which may be reasonably anticipated in providing benefits to workmen, laborers, and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program . . . for defraying costs of apprenticeship or other similar programs," *id.* § 39.12.010(3)(b).

The state statute does not directly establish the prevailing rate of wage in a particular locality. An industrial statistician from the Washington Department of Labor and Industries determines what the prevailing wage is with respect to each trade and occupation based upon surveys of area wages and benefits. *See id.* § 39.12.015. The industrial statistician's cal-

[3] "In the event that there is not a majority in the same trade or occupation paid at the same rate, then the average rate of hourly wage and overtime paid to such laborers, workmen, or mechanics in the same trade or occupation shall be the prevailing rate." Wash. Rev. Code § 39.12.010(1).

culation of the prevailing wage in the area must include a component for "usual benefits" that are paid in the local area, including provision of apprenticeship training benefits.

[3] Plaintiff Local Apprenticeship Fund alleges that the defendant contractors are in violation of the Washington statute by failing to pay the full prevailing rate of costs for apprenticeship training as required pursuant to Washington Revised Code § 39.12.010(3)(b). For purposes of the well-pleaded complaint rule applicable to motions to dismiss, the defendant contractors do not contest that the Washington statute compels employers to make contributions to local employee welfare plans and establishes the level at which such contributions must be made.

V

The Employee Retirement Income Security Act ("ERISA")[4] of 1974 is a comprehensive remedial statute "designed to protect the interest of employees in pension and welfare plans, and to protect employers from conflicting and inconsistent state and local regulation of such plans." *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1501 (9th Cir. 1985)(citations omitted).

The interests of employees are protected through substantive requirements imposed upon pension plans relating to participation, funding, and vesting, 29 U.S.C. §§ 1051-1086, and through uniform procedural standards for reporting, disclosure, and fiduciary responsibilities for both pension and welfare plans, 29 U.S.C. §§ 1021-1031, 1101-1114. The promotion of uniform standards and regulations of employee benefit plans is achieved through preemption, with a few exceptions, of all state laws relating to such plans. *Scott*, 754 F.2d at 1501.

[4]Pub. L. No. 93-406, 88 Stat. 829 (1974), as amended, (codified in scattered sections of 5, 18, 26, 29 & 31 U.S.C.).

Section 514(a) of ERISA, as codified at 29 U.S.C. § 1144(a), provides that "the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title."[5]

The Local Apprenticeship Fund is concededly an "employee benefit plan" covered by the preemption clause of section 514(a). Since the fund is established to provide "apprenticeship or other training programs," it is an "employee welfare benefit plan" within the meaning of ERISA section 3(1), 29 U.S.C. § 1002(1).

Section 514(b) excludes specified types of state laws, primarily insurance, banking, securities, and generally applicable criminal laws, from the preemption clause. 29 U.S.C. § 1144(b).[6] None of those exceptions apply in this case.

The sole focus of our analysis, then, is the effect upon Washington Revised Code chapter 39.12 of the sweeping language in section 514(a), which the Supreme Court has

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[5]Section 514(c)(2) defines the term "State" to include "a State, any political subdivisions thereof, or any agency or instrumentality of either, which *purports to regulate*, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." 29 U.S.C. § 1144(c)(2) (emphasis added).

Section 514(c)(1) defines "State law" to include "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1).

[6]Section 514(b)(6) also excepts state insurance regulations which apply to a "multiple employer welfare arrangement." 29 U.S.C. § 1144(b)(6). The Local Apprenticeship Fund involved in this case would likely fall outside of this exception because "multiple employer welfare arrangement" is defined to exclude any plan or arrangement established pursuant to a collective bargaining agreement. *See* § 3(40)(A), 29 U.S.C. § 1002(40)(A). At any rate, the Local Apprenticeship Fund has not alleged before this court or the district court that this preemption exception applies.

described as a "virtually unique pre-emption provision." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983). Preemption is a question of federal law involving statutory interpretation which we review de novo. *Nevill v. Shell Oil Co.*, 835 F.2d 209, 211 (9th Cir. 1987).

Washington's prevailing wage statute as applied in this case is preempted if it both "relate[s]" to an ERISA plan and "purport[s] to regulate, directly or indirectly" employee benefit plans. *Martori Bros. Distribs. v. James-Massengale*, 781 F.2d 1349, 1356 (9th Cir.), *amended*, 791 F.2d 799 (9th Cir.), *cert. denied*, 107 S. Ct. 435 (1986).

"A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983)(footnote omitted). A law "purports to regulate" a plan if it attempts "to reach in one way or another the 'terms and conditions of employee benefit plans.' " *Lane v. Goren*, 743 F.2d 1337, 1339 (9th Cir. 1984)(quoting 29 U.S.C. § 1144(c)(2)). The narrower "purports to regulate" test is included within the broader "relates to" test. *Martori Bros. Distributors.*, 781 F.2d at 1359. Thus a finding that a statute "purports to regulate" an employee benefit plan necessarily includes a finding that it "relates to" such a plan.[7]

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[7]One commentary explained the basis for the two-prong test for ERISA preemption in this manner:

> Section 514(a) preempts laws of a "State," which section 514(c)(2) defines as an instrumentality "which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans . . . ." Thus, the term "State" either informs the meaning of "relate to" or imposes independent requirements of its own. In either event, a state law is not preempted unless it regulates an employee benefit plan "directly or indirectly."

Kilberg & Inman, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 Tex. L. Rev. 1313, 1325 (1984) (emphasis deleted)(footnote omitted).

In *Martori Bros. Distributors*, we identified four categories of state laws which have been held preempted by section 514(a) because they "relate to" ERISA plans:

> First, laws that regulate the type of benefits or terms of ERISA plans. Second, laws that create reporting, disclosure, funding, or vesting requirements for ERISA plans. Third, laws that provide rules for the calculation of the amount of benefits to be paid under ERISA plans. Fourth, laws and common-law rules that provide remedies for misconduct growing out of the administration of the ERISA plan.

781 F.2d at 1357 (listing cases).

[4] The Washington prevailing wage statute, Wash. Rev. Code ch. 39.12, falls within the second category: laws that create funding requirements for employee benefit plans. Statutes regulating contributions to ERISA plans have consistently been held preempted. *See, e.g., Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294, 1297-1300 (N.D. Cal. 1977) (California statute regulating funding and disclosure of health care service plans preempted by ERISA), *aff'd*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978); *Stone & Webster Eng'g Corp. v. Ilsley*, 518 F. Supp. 1297, 1299-1301 (D. Conn. 1981) (Connecticut statute mandating contributions to employee benefit plans under certain circumstances held preempted by ERISA), *aff'd*, 690 F.2d 323 (2d Cir. 1982), *aff'd mem. sub nom. Arcudi v. Stone & Webster Eng'g Corp.*, 463 U.S. 1220 (1983).

[5] However, the Local Apprenticeship Fund contends that state laws, such as the Washington prevailing wage statute, which relate to *contributions* rather than the composition or administration of *benefits*, do not "relate to" or "purport to regulate" employee benefit plans.[8] This "contribution/

[8]The Local Apprenticeship Fund relies principally upon *Sasso v. Vachris*, 66 N.Y.2d 28, 494 N.Y.S.2d 856, 484 N.E.2d 1359 (1985), for this proposi-

benefit" dichotomy, while perhaps superficially appealing, is unsupported by the law.

In *Stone & Webster Eng'g Corp. v. Ilsley*, a federal district court held that a Connecticut statute which required an

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tion. However, the "contribution/benefit" dichotomy which the plaintiff postulates is entirely absent from the analysis in the *Sasso* decision.

In *Sasso*, the New York Court of Appeals considered whether ERISA preempted a New York statute which provided a cause of action against stockholders of closely held corporations for delinquent contributions for employee benefits. In holding the statute not preempted, the court emphasized that the New York statute was merely a supplemental remedial provision "by which plaintiffs can recover delinquent contributions already due and owing to them pursuant to the corporation's obligations under the collective bargaining and trust agreements." 66 N.Y.2d at 33, 494 N.Y.S.2d at 859, 484 N.E.2d at 1362. The court went on to explain that "the only effect of [the state statute] on employee benefit plans is to give plaintiffs a cause of action to recover payments the corporation was already obligated to provide." 66 N.Y.2d at 34, 494 N.Y.S.2d at 859, 484 N.E.2d at 1362.

By contrast, the Washington prevailing wage statute imposes an additional substantive mandate upon employers by requiring them to make contributions at a higher level not established by collective bargaining agreement or by the terms of the employee benefit plan.

Moreover, the *Sasso* decision is of doubtful validity. Two federal district courts considering a similar New York cause of action against corporate directors and officers squarely held that ERISA preempts liability shifting provisions when relied upon in a state action to collect delinquent contributions. *Trustees of Sheet Metal Workers' Int'l Ass'n Production Workers' Welfare Fund v. Aberdeen Blower and Sheet Metal Workers, Inc.*, 559 F. Supp. 561, 562-63 (E.D. N.Y. 1983); *Calhoon v. Bonnabel*, 560 F. Supp. 101, 109-110 (S.D. N.Y. 1982); *see also Baker v. Caravan Moving Corp.*, 561 F. Supp. 337, 342 (N.D. Ill. 1983) (Illinois wage and collection statute insofar as it requires employer contributions to employee benefit plans is preempted by ERISA). The Second Circuit approved of these district court rulings in a decision holding that state wage collection statutes are preempted insofar as they permit a cause of action against employers for delinquent benefits. *Gilbert v. Burlington Indus., Inc.*, 765 F.2d 320, 327-28 (2d Cir. 1985), *aff'd mem.*, 106 S. Ct. 3267 (1986) & *aff'd mem. sub nom. Roberts v. Burlington Indus., Inc.*, 106 S. Ct. 3267 (1986).

employer to continue payments to employee welfare funds for a former employee receiving workers' compensation due to a job related injury was preempted by ERISA. The court expressly rejected a similar argument that ERISA does not purport to establish contribution levels for plans, and thus a state statute mandating continuation of contributions did not "relate to" an employee benefit plan. 518 F. Supp. at 1300-01. The court held that the challenged Connecticut statute "fundamentally and directly alters the employer's negotiated obligations." *Id.* at 1300. As such, the statute indirectly regulated the very benefits provided under the employee benefit plan. *Id.* In affirming the district court, the Second Circuit ruled that the purpose of the Connecticut law was "to add an additional statutory requirement — the cost of which is to be borne by the employer — to a private employee benefit plan," and thus the statute was clearly preempted by ERISA. *Stone & Webster Eng'g Corp. v. Ilsley,* 690 F.2d 323, 329 (2d Cir. 1982), *aff'd mem. sub nom. Arcudi v. Stone & Webster Eng'g Corp.,* 463 U.S. 1220 (1963).

This analysis applies with equal force to the Washington prevailing wage statute insofar as it mandates a particular level of contributions by employers to employee benefit plans. Employer contributions are the fuel for benefit plans, such as the plaintiff Local Apprenticeship Fund. Without employer contributions, there can be no functioning ERISA plans. A statute which mandates employer contributions to benefit plans and which effectively dictates the level at which those required contributions must be made has a most direct connection with an employee benefit plan. As the district court concluded, "[T]he rate of contribution rests at the very core of ERISA's consideration."

[6] The Local Apprenticeship Fund still contends that State statutes regulating contributions by employers to "employee welfare benefit plans," § 3(1), 29 U.S.C. § 1002(1), (as opposed to "employee pension benefit plans," § 3(2), 29 U.S.C. § 1002(2)), are not preempted by ERISA because Con-

gress did not purport to regulate the obligation to make contributions to welfare plans.[9] Although ERISA establishes minimum standards with regard to funding of pension plans, 29 U.S.C. §§ 1081-86, those provisions are inapplicable to welfare plans, including apprenticeship trusts.

[7] However, it is not necessary to identify a specific ERISA provision that conflicts with a challenged State law. *See generally* Kilberg & Inman, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 Tex. L. Rev. 1313, 1315-16, 1321-24 (1984). Section 514(a) "was meant to clear away all state laws bearing on benefit plans . . . [even though] many aspects of benefit plans generally, and of welfare benefit plans in particular" remain unregulated by ERISA. *Delta Air Lines, Inc. v. Kramarsky*, 650 F.2d 1287, 1304 (2d Cir.), *vacated in part on other grounds*, 666 F.2d 21 (2d Cir. 1981), *aff'd in part, vacated in part sub nom. Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). "ERISA may not confront the 'contribution level' issue at this time, but section [514(a)] has cleared the decks for such provisions, should Congress choose to address this concern in the future." *Stone & Webster Eng'g Corp.*, 518 F. Supp. at 1301.

[8] Furthermore, preemption of state laws regulating employer contributions to employee welfare plans serves the Congressional purpose of "eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." 120 Cong. Rec. 29,933 (1974)(remarks of Sen. Williams)[10] (quoted in *Shaw*, 463 U.S. at 99). This is particu-

[9] Although the particular fund involved in this case is a welfare plan, we note that Washington Revised Code § 39.12.010(3) does not limit the term "usual benefits" included in the "prevailing rate of wage" to what would constitute "employee welfare plans" under ERISA. "Usual benefits" is also defined as including "the rate of costs . . . which may be reasonably anticipated in providing benefits . . . for . . . pensions on retirement or death." Wash. Rev. Code § 39.12.010(3)(b).

[10] *Reprinted in Subcomm. on Labor of the House Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974*, at 4745 (1976).

larly important in circumstances where, as in this case, employers have entered into collective bargaining agreements with national unions to make payments into inter-state employee benefit plans. State interference with such national arrangements is foreclosed by the ERISA preemption clause.

As Senator Javits explained during the legislative debate over ERISA, "[T]he emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required ... the displacement of State action in the field of private employee benefit programs." 120 Cong. Rec. 29,942 (1974) (remarks of Sen. Javits)[11] (quoted in *Shaw*, 463 U.S. at 99-100 n.20).

Finally, the Local Fund argues that state labor laws that govern working conditions and labor costs are a traditional area of state authority, and thus should not be regarded as preempted.

[9] In order to avoid preemption, it is not sufficient that a state statute represent the exercise of a traditional state power. *Gilbert v. Burlington Indus., Inc.*, 765 F.2d 320, 327 (2d Cir. 1985), *aff'd mem.*, 106 S. Ct. 3267 (1986) & *aff'd mem. sub nom. Roberts v. Burlington Indus., Inc.*, 106 S. Ct. 3267 (1986). A purported fundamental state interest is relevant only when there is an element of uncertainty as to whether the challenged state law falls within the scope of the ERISA preemption clause. In cases of uncertainty, our analysis is guided by a rebuttable "presum[ption] that Congress did not intend to pre-empt areas of traditional state regulation." *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985).

[10] However, the strength of the state interest is of no consequence where the state law clearly "purports to regulate" an employee benefit plan. "In order to avoid being preempted, a

[11] *Reprinted in ERISA Legislative History*, at 4670 .

state law in addition to being an exercise of traditional police powers must also affect the plan 'in too tenuous, remote, or peripheral a manner to warrant a finding that the law "relates to" the plan.' " *Gilbert*, 765 F.2d at 327 (quoting *Shaw*, 463 U.S. at 100 n.21). Such assuredly is not the case here.

VI

In conclusion, the clear and express purpose of Washington Revised Code § 39.12.010(3) is to govern employer contributions to employee benefit plans, including apprenticeship training plans. The statute on its face "purports to regulate" employee benefit plans. Accordingly, we hold that, to the extent the Washington prevailing wage statute requires employers to maintain a certain level of contributions to employee benefit plans, it is preempted by section 514(a).

AFFIRMED.

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APPENDIX B

B-1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LOCAL UNION 598, PLUMBERS AND PIPEFITTERS INDUSTRY JOURNEYMEN & APPRENTICESHIP TRAIN FUND, *Plaintiff,* v. THE BABCOCK & WILCOX COMPANY, et al., *Defendants.*	CAUSE NO. C84-1120C JUDGMENT ON DECISION BY THE COURT

This action came on for consideration before the court, United States District Judge John C. Coughenour presiding. The issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED, there being no just reason for delay, defendants Bechtel Power Corporation and J.A. Jones Construction Company's motions to dismiss are GRANTED. This action is hereby DISMISSED with prejudice.

DATED this 16th day of May, 1985.

/ s /
Deputy Clerk of Court

JUDGMENT ON DECISION
BY THE COURT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LOCAL UNION 598, PLUMBERS AND PIPEFITTERS INDUSTRY JOURNEYMEN & APPRENTICESHIP TRAINING FUND,

Plaintiff,

vs.

THE BABCOCK & WILCOX COMPANY; COMBUSTION ENGINEERING, INC.; FOSTER WHEELER ENERGY CORP.; GUY F. ATKINSON COMPANY; WRIGHT-SCHUCHART, INC.; JOHNSON CONTROLS, INC.; J.A. JONES CONSTRUCTION COMPANY; PETER KIEWIT SONS' COMPANY; A.J. ZINDA COMPANY; BECHTEL POWER CORPORATION; and RUST ENGINEERING COMPANY,

Defendants.

NO. C84-1120C

ORDER GRANTING DEFENDANTS BECHTEL POWER CORPORATION AND J.A. JONES CONSTRUCTION COMPANY'S MOTION TO DISMISS

THIS MATTER comes before the Court on defendants Bechtel Power Corporation and J.A. Jones Construction Company's motions to dismiss. Upon due consideration of the pleadings, affidavits, and oral argument heard the 10th day of May, 1985, and the Court being fully advised, defendants' motions are hereby GRANTED.

This case involves a dispute between certain contractors at the Washington Public Power Supply System (WPPSS) Project near Richland, Washington, and a collective apprenticeship

training fund. Plaintiff (Local Fund) is the Local Union 598 of the Plumbers & Pipefitters Industry Journeymen & Apprenticeship Training Fund. Defendants before the Court presently are Bechtel Power Corporation and J.A. Jones Construction Company. All other defendants have been dismissed with prejudice by stipulation with counsel for the plaintiff.

Local Fund seeks by this action contributions from the defendants for labor performed by the members of the Local Union 598. Defendants have contributed to a benefit plan pursuant to a collective bargaining agreement between their employer association and the International Union; however, plaintiff contends that those contributions were insufficient, being less than the amounts payable pursuant to the Washington State minimum wage on public works law, RCW 39.12 *et seq.*, which obligates employers at public works projects in this state to pay workers the "prevailing rate" for their labor. RCW 39.12.010(3)(b) is the crux of plaintiff's claims and includes the computation of the "prevailing rate":

> "The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to workmen, laborers, and mechanics pursuant to an enforcible commitment to carry out a financially responsible plan or program... for defraying costs of apprenticeship...."

According to the plaintiff, the defendant contractors hired workmen at WPPSS, but failed to pay the prevailing wage because the contractors' contributions for apprenticeship costs were paid at a lesser rate set by the agreement between the employer association and the International Union. Plaintiff therefore seeks to recover the difference between the amount paid under the collective bargaining agreement with the International Union and the amount "prevailing" in the WPPSS locality.

Defendants' argument is threefold: First, defendants argue that the contributions sought by plaintiff based upon alleged liability arising from state law cannot be recovered because the state law is pre-empted by the Federal Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1144(a),

"relating to" an employee benefit plan subject to ERISA regulation. Secondly, defendants seek dismissal because, pursuant to the state law, the plaintiff is without standing to bring this action. Finally, defendants contend that even if plaintiff had standing, it has failed to state a proper cause of action under the state statute.

It is undisputed that the instant plan is subject to regulation under ERISA and that ERISA expressly pre-empts state laws which relate to plans governed by ERISA. ERISA "is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 103 S. Ct. 2890 (1983) ("*Shaw*"). Both the language of the statute and its legislative history clearly show:

> "'[t]he emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required... the displacement of State action in the field of private employee benefit programs.'" *Russell v. Massachusetts Mutual Life Insurance Co.*, 722 F.2d 482 at 487 (9th Cir. 1983) (quoting Senator Javits).

Section 514(a) of ERISA, 29 U.S.C. §1144(a), expressly pre-empts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan covered by [ERISA]."

Thus, if RCW 39.12 "relates to" the instant benefit plan, there can simply be no question that its enforcement is pre-empted, pursuant to the Supremacy Clause of the Constitution.

While the *Shaw* opinion refrains from drawing the line in determining if a plan "relates to" ERISA, the extraordinary breadth intended by Congress in enacting section 514(a) is clearly expressed:

> "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw* at 2900.

What might fall outside of the broad scope was also suggested by the court:

> Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan. *Cf. American Telephone and Telegraph Co. v. Merry*, 592 F.2d 118, 121 (CA2 1979) (state garnishment of a spouse's pension income to enforce alimony and support orders is not pre-empted.)" *Id.* at 2901, n. 21.

Plaintiff contends that RCW 39.12 falls within this "peripheral" exception recognized by the Court in *Shaw*. However, this analysis is misled. The *Merry* case cited by the Supreme Court in *Shaw* and other cases applying this exception since the *Shaw* ruling have universally involved matters at the extreme in being unrelated to employee plan regulation. *Cf. Lane v. Goren*, 743 F.2d 1337 (9th Cir. 1984) (California employment discrimination statute not pre-empted) with *Champion International Corp. v. Brown*, 731 F.2d 1406 (9th Cir. 1984) (Montana age discrimination law held pre-empted).

In contrast, the subject of the state regulation now before the Court is the rate of contribution which employers must pay. This can hardly be considered tenuous, remote, or peripheral, to ERISA regulation. Rather, the rate of contribution rests at the very core of ERISA's consideration. Consequently, RCW 39.12 certainly "relates" to ERISA regulation and is pre-empted by section 514(a). *Shaw, supra.*

Plaintiff argues that because ERISA allows contribution rates to be bargained by the parties to a benefit plan, the state may impose its regulation. This argument ignores both the broad intention of ERISA's pre-emption clause and the case law which has followed its enactment. *See Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323 (2nd Cir. 1982), *aff'd* without opinion, 103 S. Ct. 3564 (1983) (Connecticut statute requiring contributions pre-empted). Even in matters left to free bargaining between the parties, the fundamental purpose of ERISA's pre-emption includes freedom from state regulation. ERISA's pre-emption is not limited to matters expressly addressed by the statute itself. *See Shaw* at 4971.

Similarly, plaintiff's argument that ERISA does not pre-empt statutes which address "fundamental local interests" ignores the cases which have arisen subsequent to ERISA's enactment, even where matters of unquestionably significant local interests were concerned. *See, e.g., Shaw, supra; Champion International Corp., supra.* Cases arising under the National Labor Relations Act, concerning pre-emption, cited by plaintiff, are inapposite.

Thus, because plaintiff's sole cause of action seeks relief pursuant to a statute which cannot stand against ERISA's broad scope of pre-emption, this case must be dismissed. Accordingly, the Court need not address whether plaintiff would have had standing under Washington law, nor whether RCW 39.12 requires an "enforcible commitment to carry out a financially responsible plan" between the plaintiff and the defendants to allow recovery.

IT IS THEREFORE ORDERED THAT:

(1) Defendants Bechtel Power Corporation and J.A. Jones Construction Company's motions to dismiss are GRANTED; and

(2) This action is hereby DISMISSED with prejudice.

The Clerk of this Court is directed to enter Judgment in accordance with this Order and to send uncertified copies of this Order and Judgment to all counsel of record.

DATED 16th day of May, 1985.

/ s /

John C. Coughenour
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOCAL UNION 598, PLUMBERS & PIPEFITTERS INDUSTRY JOURNEYMEN & APPRENTICES TRAINING FUND, *Plaintiff-Appellant,* v. J.A. JONES CONSTRUCTION COMPANY; BECHTEL POWER CORPORATION; and JOHNSON CONTROLS, INC., *Defendants-Appellees.*	NO. 85-3894

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Local Union 598, Plumbers and Pipefitters Industry Journeymen and Apprenticeship Training Fund, the Plaintiff-Appellant above-named, hereby appeals to the Supreme Court of the United States from the Ninth Circuit's final decision affirming the District Court's dismissal of this action entered on May 18, 1988.

This appeal is taken pursuant to Title 28, U.S.C. § 1254(2).

DATED this 1st day of August, 1988.

/ s /

Hugh Hafer
David Campbell
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOCAL UNION 598, PLUMBERS & PIPEFITTERS INDUSTRY JOURNEYMEN & APPRENTICES TRAINING FUND, *Plaintiff-Appellant,* v. J.A. JONES CONSTRUCTION COMPANY; BECHTEL POWER CORPORATION; and JOHNSON CONTROLS, INC., *Defendants-Appellees.*	NO. 85-3894

CERTIFICATE OF SERVICE

Hugh Hafer states:

1. I am the attorney of record in the above-referenced named case and am a member of the Bar of this Court.

2. On August 1, 1988, I caused the original of Appellants' Notice of Appeal to the United States Supreme Court to be deposited in the United States Express Mail, postage pre-paid, addressed to:

Clerk
United States Court of Appeals
Ninth Circuit
P.O. Box 547, Room 202
Seventh & Mission Streets
San Francisco, CA 94101

and,

3. I caused one copy of the foregoing Appellants' Notice of Appeal to the United States Supreme Court, to be placed in the United States mail, postage pre-paid, addressed to:

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/s/
Hugh Hafer

APPENDIX D

APPENDIX D

Employee Retirement Income Security Act of 1974, Section 514 (as amended), 29 U.S.C. § 1144...

§ 11.44. Other laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)]. This section shall take effect on January 1, 1975.

(b) Construction and application. (1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2) (A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 4(a) [29 USCS § 1003(a)], which is not exempt under section 4(b) [29 USCS § 1003(b)] (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 506 of this Act [29 USCS § 1136].

(4) Subsection (a) shall not apply to any generally applicable criminal law of a state.

(5) (A) Except as provided in subparagraph (B), subsection (a) shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) —

(i) any State tax law relating to employee benefit plans, or

(ii) Any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle [29 USCS §§ 1021 et seq., 1101 et seq.], and the preceding sections of this part [29 USCS §§ 1131 et seq.] to the extent they govern matters which are governed by the provision of such parts 1 and 4 [29 USCS §§ 1021 et seq., 1101 et seq.], shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after the date of the enactment of this paragraph [enacted Jan. 14, 1983]), but the Secretary may enter into cooperative arrangements under this paragraph and section 506 [29 USCS § 1136] with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts.

(6) (A) Notwithstanding any other provision of this section —

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides —

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provision to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this title, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this title.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 3(1) and section 4 [29 USCS §§ 1002*(1)*, 1003] necessary to be considered an employee welfare benefit plan to which this title applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this title apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(7) Subsection (a) shall not apply to qualified domestic relations orders (within the meaning of section 206(d)(3)(B)(i)) [29 USCS § 1056(d)(3)(B)(i)].

(8) Subsection (a) of this section shall not apply to any State law mandating that an employee benefit plan not include any provision which has the effect of limiting or excluding coverage or payment for any health care for an individual who would otherwise be covered or entitled to benefits or services under the terms of the employee benefit plan, because that individual is provided, or is eligible for, benefits or services pursuant to a plan under title XIX of the Social Security Act [42 USCS §§ 1396 et seq.], to the extent such law is necessary for the State to be eligible to receive reimbursement under title XIX of that Act [42 USCS §§ 1396 et seq.].

(c) **Definitions.** For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

(d) **Alteration, amendment, modification, invalidation, impairment or supersedure of any law of the United States prohibited.** Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 [29 USCS § 1031] and 507(b) [29 USCS § 1137(b)]) or any rule or regulation issued under any such law.

Washington's Prevailing Wages On Public Works Statute, RCW 39.12 (as amended; pertinent provisions)...

39.12.010. Definitions

(1) The "prevailing rate of wage", for the intents and purposes of this chapter, shall be the rate of hourly wage, usual benefits, and overtime paid in the locality, as hereinafter defined, to the majority of workmen, laborers or mechanics, in the same trade or occupation. In the event that there is not a majority in the same trade or occupation paid at the same rate, then the average rate of hourly wage and overtime paid to such laborers, workmen or mechanics in the same trade or occupation shall be the prevailing rate. If the wage paid by any contractor or subcontractor to laborers, workmen or mechanics on any public work is based on some period of time other than an hour, the hourly wage for the purposes of this chapter shall be mathematically determined by the number of hours worked in such period of time.

(2) The "locality" for the purposes of this chapter shall be the largest city in the county wherein the physical work is being performed.

(3) The "usual benefits" for the purposes of this chapter shall include the amount of:

(a) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and

(b) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to workmen, laborers, and mechanics pursuant to an enforcible commitment to carry out a financially responsible plan or program which was communicated in writing to the workmen, laborers, and mechanics affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance disability and sickness insurance, or accident insurance,

for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other federal, state, or local law to provide any of such benefits.

(4) An "interested party" for the purposes of this chapter shall include a contractor, subcontractor, an employee of a contractor or subcontractor, an organization whose members' wages, benefits, and conditions of employment are affected by this chapter, and the director of labor and industries or the director's designee.

39.12.015. Industrial statistician to make determinations of prevailing rate

All determinations of the prevailing rate of wage shall be made by the industrial statistician of the department of labor and industries.

39.12.020. Prevailing rate to be paid on public works and under public building service maintenance contracts — Posting of statement of intent

The hourly wages to be paid to laborers, workmen or mechanics, upon all public works and under all public building service maintenance contracts of the state or any county, municipality or political subdivision created by its laws, shall be not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality within the state where such labor is performed. For a contract in excess of ten thousand dollars, a contractor required to pay the prevailing rate of wage shall post in a location readily visible to workers at the job site: *Provided,* That on road construction, sewer line, pipeline, transmission line, street, or alley improvement projects for which no field office is needed or established, a contractor may post the prevailing rate of wage statement at the contractor's local office, gravel crushing, concrete, or asphalt batch plant as long as the

contractor provides a copy of the wage statement to any employee on request:

(1) A copy of a statement of intent to pay prevailing wages approved by the industrial statistician of the department of labor and industries under RCW 39.12.040; and

(2) The address and telephone number of the industrial statistician of the department of labor and industries where a complaint or inquiry concerning prevailing wages may be made.

This chapter shall not apply to workmen or other persons regularly employed on monthly or per diem salary by the state, or any county, municipality, or political subdivision created by its laws.

39.12.021. Prevailing rate to be paid on public works — Apprentice workmen

Apprentice workmen employed upon public works projects for whom an apprenticeship agreement has been registered and approved with the state apprenticeship council pursuant to chapter 49.04 RCW, must be paid at least the prevailing hourly rate for an apprentice of that trade. Any workman for whom an apprenticeship agreement has not been registered and approved by the state apprenticeship council shall be considered to be a fully qualified journeyman, and, therefore, shall be paid at the prevailing hourly rate for journeymen.

39.12.030. Contract specifications must state minimum hourly rate — Stipulation for payment

The specifications for every contract for the construction, reconstruction, maintenance or repair of any public work to which the state or any county, municipality, or political subdivision created by its laws is a party, shall contain a provision stating the hourly minimum rate of wage, not less than the prevailing rate of wage, which may be paid to laborers, workmen or mechanics in each trade or occupation required for such public

work employed in the performance of the contract either by the contractor, subcontractor or other person doing or contracting to do the whole or any part of the work contemplated by the contract, and the contract shall contain a stipulation that such laborers, workmen or mechanics shall be paid not less than such specified hourly minimum rate of wage.